

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

TCF NATIONAL BANK,)
v.)
Plaintiff,)
)
Case No. 4:10-cv-04149-LLP
)
BEN S. BERNANKE, et al.)
)
Defendants.)
)

**MOTION BY THE CLASS OF PLAINTIFFS IN MDL 1720 FOR LEAVE TO FILE
BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFF TCF'S MOTION
FOR PRELIMINARY INJUNCTION**

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Attorneys For The Class Of Plaintiffs In MDL 1720

The Class of Plaintiffs in *In Re Payment Card Interchange Fee And Merchant-Discount Antitrust Litigation*, No. 1:05-MD-1720 (E.D.N.Y.) (“MDL Class”) respectfully moves this Court for an Order granting leave to file an *amicus curiae* brief in this case in support of defendants. The MDL Class anticipates filing its *amicus curiae* brief on or before March 11, 2011, the deadline set by this Court in its Order of December 10, 2010 (Dkt. # 47)

Comprised of a class of merchants and trade associations, the MDL Class represents millions of merchants that accept Visa and MasterCard debit cards as forms of payment.¹ The MDL Class submits this motion, and subsequent *amicus* brief, to express its opposition to the positions and factual assertions TCF has presented in this case, and to provide the Court with key information regarding the history and economics of the payment card—and specifically debit card—industry in the United States. MDL Class counsel is intimately familiar with the development and details of debit card products and payment networks, both domestically and abroad, and the respective effects on competition.

The MDL Class is uniquely positioned to provide essential and helpful information and perspective related to interchange fees on debit cards. In *In Re Payment Card Interchange Fee And Merchant-Discount Antitrust Litigation*, MDL 1720, the Class Plaintiffs are challenging the historic concerted conduct of Visa and MasterCard (the “Networks”), and their member banks,

¹ The named class representatives include a broad cross-section of merchants, such as the National Grocers Association, the National Association of Convenience Stores, the National Restaurant Association, the National Community Pharmacists Association, The National Cooperative Grocers Association, NATSO, Inc. (formerly National Association of Truck Stop Owners), Affiliated Foods Midwest Cooperative, Payless ShoeSource, Inc., CHS, Inc., Jetro Cash & Carry Enterprises, LLC, Coborn’s Incorporated, D’Agostino Supermarkets, Traditions, Ltd., Photos Etc. Corporation, Capital Audio Electronics, Inc., Crystal Rock LLC, Discount Optics, Inc., Leon’s Transmission Service, Inc., and Parkway Corp.

and the network rules that require every card-issuing bank to deduct a specified interchange fee (the “Interchange Rules”) on every debit-card transaction. The MDL Class alleges that the Networks and their member banks (including TCF) have market power in the market for credit card network services and debit card network services, which they abused by fixing uniform schedules of default interchange fees for all credit-card and debit-card transactions and by imposing rules that restrict merchants’ acceptance of payment cards at the point of sale. Because of the Networks’ market power, merchants in the MDL Class have no choice but to accept Visa and MasterCard debit cards and to pay the corresponding supracompetitive interchange fees and to abide by the Networks’ anti-steering rules. The experience, knowledge and extraordinary record the MDL Class has gained through challenging this anticompetitive conduct will provide helpful context and analysis in the present case.

Additionally, in litigating MDL 1720, Class counsel has worked with the leading experts on payment card economics who have scrupulously studied interchange and its regulation in the U.S. and around the world. With its proposed *amicus* brief, the MDL Class intends to offer a declaration from at least one such expert to assist in resolution of TCF’s constitutional challenges to the Durbin Amendment’s regulation of debit interchange fees.

This unique and informed perspective on debit-card interchange fees supports participation of the MDL Class as *amicus curiae*. See *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (listing among factors supporting *amicus* participation, “when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide”). Counsel for the MDL class contacted plaintiff’s counsel on March 1, 2011 to advise of their intention to file this motion for leave. Plaintiff’s

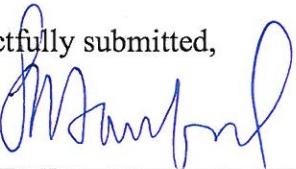
counsel indicated that plaintiff would “not oppose” this motion or submission of a brief as *amicus curiae*.

The MDL Class respectfully requests the Court grant its motion for leave to file a brief as *amicus curiae*.

Dated: March 2, 2011.

Respectfully submitted,

By:



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